quired because of the impossibility of apportioning the crop, and because of the fact that the land is the principal producing agency. In the case of separate personalty employed by the spouse in carrying on a business, on the other hand, two different rules have been declared for determining the character of the increase. (1) Under the rule of the principal case, the increase thus produced will not be apportioned between the community and the separate estate, but will be held to belong to the community if it was produced mainly through the labor of the spouse, but if it arose mainly from the employment of the property as capital, then it will be separate property. (2) A more logical rule seems to be contended for by Professor Pomeroy[8] that where one spouse employs his separate estate in carrying on a business, trade or profession during the continuance of the marriage, that part of the increase should be held to be separate estate which would represent the return of a like amount of capital if invested at a fair, average rate of interest during the entire period of the marriage, while the residue should be held to be community property. In the case of Pereira v. Pereira[9] the California Supreme Court adopts this rule with this modification: that it is competent for the contestant to show the actual earning power of the capital invested in the business, but that if the business has been prosperous, it will be presumed, in the absence of proof, that the earning power of the capital employed will at least equal the usual rate of interest on a long term investment which is well secured.

J. D. R.

CONSTITUTIONAL LAW: IMPRISONMENT FOR DEBT.—In interpreting the almost universal clause in state constitutions abolishing imprisonment for debt, the courts are practically unanimous in holding that such provisions do away with arrest as an accessory to the collection of contract obligations, but leave it unabated as an aid to actions *ex delicto*. All of these interpretations are based on one or both of the following arguments: first, that the words of constitutions are the words of the people, that they must be given their sense in common parlance stripped of legal subtleties, and that when the man in the street says "debt," he means contract debt; second, that there is a semi-criminal and punitive element in tort actions which justifies imprisonment as a vindication of the law upon which the action is based.[1]

When the question arose in *Bronson v. Syverson*,[2] the Wash-

---

[8] 4 West Coast Rep. 193.

[9] (1909), 156 Cal. 1, 103 Pac. 488, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880.

[1] Bolden v. Jensen (1895), 69 Fed. 745; United States v. Walsh (1867), 1 Abb. U. S. 66, 1 Deady, 281, Fed. Cas. No. 16,635, is the leading case on the generally accepted view. See also an exhaustive note on the whole subject in 34 L. R. A. 634.

[2] (Wash., Nov. 22, 1915), 152 Pac. 1039.

ington Supreme Court denied the validity of both of these conclusions, and held that, in Washington at least, tort actions are purely compensatory, and that the layman considers himself a debtor whether he owes through a promise or a wrong.

Strangely enough, while both results are based in part on the lay definition of debt, both sides revert to ancient juristic authority to determine what the modern layman means when he uses the word,[3] and unfortunately, lexicographer and jurist alike have been indefinite enough to support either contention.[4] Considering this uncertainty, it may be supposed that the man in the street would be sorely put to it to point out the distinction which the courts say he is intended to maintain.

The question is solely one of constitutional interpretation by a court of last resort and under Justice Story's rule that language in a constitution should be construed in the popular and not the technical sense opens no field of legal learning.[5] As an atavistic phenomenon, however, the argument must be of keen interest to the student of legal history, for it rattles the bones of the beginnings of assumpsit when it says that the law has less interest in enforcing duty in contract than in tort, and when it relies on a criminal aspect in delictual damages.[6]

If the result of that long line of cases, beginning with Cotesmere's observation in 1432[7] through Slade's case in 1602,[8] to Brown v. Boorman in 1844.[9] When "the House of Lords came near to recognizing the principle that case may be used in suing on any simple assumptual contract," is that the law at last recognizes the duty arising on contract as equal to that arising in tort, then the difference between tort and contract is not in the degree of legal recognition of obligation, but solely in the origin of obligation. The duty of performing contract obligations is as general as the duty of due care; it flouts the majesty of the law no more to be remiss in one than in the other and the criminal element is the same in both.

It is true that the early action of trespass was of a semi-criminal character, including with damages in their civil aspect a penal fine or imprisonment as a vindication of the law,[10] but it is equally true that until the English courts of the fifteenth century

---

[3] New Jersey Ins. Co. v. Meeker (1875), 37 N. J. Law, 282, 301, citing Sir. Edw. Coke's commentary on the word "debitum" as used in the Statute of Merton; Bouvier's Law Dictionary, p. 513.

[4] See 42 definitions in 13 Cyc. 394, and 25 definitions in Words and Phrases Judicially Defined.

[5] Story on the Constitution, 451.

[6] Street, Foundations of Legal Liability, vol. iii, chap. 14.

[7] Y. B. 2 Hen. IV 33, pl. 60; Y. B. 3 Hen. VI 36. pl. 33.

[8] 4 Coke 91a, 76 Eng. Rep. R. 1072.

[9] 11 Cl. & F. I. in House of Lords, 43 Eng. C. L. 843, 8 Eng. Rep. R. 1003 in Queen's Bench and Exchequer Chamber.

[10] 2 Pollock and Maitland, History of the English Law, 2d ed. 524 et seq.

could perceive in the breach of simple contract this same semi-criminal aspect, they refused to remedy it.[11] The survival of this distinction between tort and contract debts is an example of the pertinacious reluctance of Anglo-Saxon law to recognize the legal obligation of a promise.

Still there can be no quarrel with either result. The prevailing opinion probably represents the popular conception of debt as it is, notwithstanding five centuries of legal effort, while the Washington decision typifies the goal toward which it is reaching—a conception of debt as an "obligation of law to make compensation."[12] and not "a sum of money belonging to one person (the creditor) but in the possession of another (the debtor)."[13]

H. S. J.

CONSTITUTIONAL LAW: INCOME TAX: SIXTEENTH AMENDMENT.—In a series of cases extending over nearly a century the Supreme Court of the United States gave a uniform construction to the provision of the constitution[1] which directs that capitation and other direct taxes, levied by Congress shall be apportioned among the states in proportion to their respective populations. The chief question lay in determining what was included in the words "and other direct tax." In 1798,[2] it was held that a tax on carriages was not a direct tax; and it was expressed as the view of Chase, J., and of Peterson, J., that the phrase "other direct tax" comprehended only a tax on land. In 1868,[3] a tax on receipts of insurance companies, and in 1869,[4] a tax on the circulating notes of state banks were held to be indirect taxes. In 1874,[5] a tax on succession to real estate was held to be indirect, the tax being declared to be not on the land, but on the right of succession. In 1880,[6] the income taxes levied during the Civil War were held not to be direct taxes. In this case the court said: "It will thus be seen that wherever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. . . . This uniform practical construction of the constitution touching so important a point, through so

---

[11] Street, Foundations of Legal Liability, vol. iii, chap. 14.

[12] Street, Foundation of Legal Liability, vol. iii, p. 129.

[13] Langdell on Contracts, § 100. And see 2 Pollock and Maitland's History of the English Law, 2d ed., 205. "To all appearances our ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own. After all, we may doubt whether the majority of fairly well-to-do people, even at this day, realize that what a man calls 'my money in the bank' is merely personal obligation of the banker to him."

[1] U. S. Const., art. i, § 9.

[2] Hylton v. United States (1798), 3 Dall. 171, 1 L. Ed. 556.

[3] Pacific Insurance Co. v. Soule (1868), 7 Wall. 433, 19 L. Ed. 95.

[4] Veazie Bank v. Fenno (1869), 8 Wall. 533, 19 L. Ed. 482.

[5] Scholey v. Rew (1874), 23 Wall. 331, 23 L. Ed. 99.

[6] Springer v. United States (1880), 102 U. S. 586, 26 L. Ed. 253.